Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	CC Docket No. 96-45
Application For Review by XO Communications Services, LLC of Decision of the Wireline Competition Bureau	)	CC Docket No. 97-21
	)	WC Docket No. 06-122

XO COMMUNICATIONS SERVICES, LLC APPLICATION FOR REVIEW OF DECISION OF THE WIRELINE COMPETITION BUREAU

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Pursuant to 47 C.F.R. § 1.115 of the rules of the Federal Communications Commission ("Commission"), XO Communications Services LLC ("XOCS") respectfully requests that the Commission review the Wireline Competition Bureau's ("Bureau") Order denying several requests for review, including one made by XOCS, of audit findings by the Universal Service Administrative Company ("USAC") that address the appropriate jurisdictional classification of revenues associated with private lines.[1] Commission review is necessary because the Bureau's decision is in conflict with case precedent and Commission policy.[2]

[1] *See In the Matter of XO Communications Services, Inc., Request for Review of Decision of the Universal Service Administrator et al.*, CC Docket Nos. 96-45, 97-21,WC Docket No. 06-122, Order, 32 FCC Rcd 2140 (rel. March 30, 3017) ("Private Line Order"). After the initial appeal was filed in 2010, XOCS converted its corporate form to a limited liability company ("LLC").

[2] *See* 47 C.F.R. § 1.115(b) (requiring an applicant to "specify, with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented: (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy. (ii) The action involves a question of law or policy which has not previously been resolved by the Commission. (iii) The action involves application of a precedent or policy which should be overturned or revised. (iv) An erroneous finding as to an important or material question of fact. (v) Prejudicial procedural error.").

I. INTRODUCTION & SUMMARY

XOCS, like many telecommunications carriers, offers a variety of private line services to customers to satisfy their networking needs. These services often are high capacity services that enable business customers to exchange files and data among company offices, backup storage facilities and other locations. XOCS classifies the jurisdiction of these services using the best available information, including the "A and Z" locations of the end points, customer certifications of interstate traffic, and the configuration of the circuits. In the underlying audit, USAC rejected XOCS's intrastate classification of physically intrastate circuits (that is, for circuits where both end points are located within the same city or state), because XOCS could not produce evidence that the traffic on the circuit was not interstate. Thus, USAC essentially began with the presumption that a physically intrastate circuit nevertheless was interstate, unless and until XOCS could prove that it was not carrying more than 10% of interstate traffic. XOCS disagreed with USAC's presumption and requirement to prove a negative (no interstate traffic) and, consequently, appealed to the Commission.

The Bureau resolved XOCS's appeal, along with several other appeals involving similar issues, in the *Private Line Order*. XOCS seeks review of the Bureau's decision because the decision is in conflict with case precedent and established Commission policy. First, the Bureau misinterpreted the Commission's orders involving the jurisdictional classification of private line revenues and, like USAC, essentially requires XOCS to prove that a circuit is *not* interstate. Commission history and the purpose of the Ten Percent Rule, however, demonstrate that so-called "mixed use" private line services are to be treated as intrastate communications if, as in the case of XOCS, the circuits are physically intrastate *and* are configured by the provider as closed networks *and* there is no affirmative evidence that any of the traffic is interstate. The

Commission specifically identified certifications from customers that the line carries more than a *de minimis* amount of interstate traffic as that type of affirmative evidence. Yet, the Bureau incorrectly interprets the Ten Percent Rule in direct contrast with this Commission precedent, finding that the existence or absence of a customer certification play no role in determining whether the proper jurisdictional treatment of mixed use or private line services is inter- or intra-state.

Further, the Bureau erred in the instructions that it provided to USAC for further consideration of the private line circuits. In remanding the case to USAC, the Bureau creates new evidentiary standards that XOCS must satisfy with respect to its private line services. The Bureau appears to require USAC to apply these newly established evidentiary standards retroactively to services XOCS provided ten years ago, in 2007. The Bureau's retroactive supplementation of the evidentiary standards for classification of private line services is unreasonable and conflicts with prior Commission decisions. Moreover, the Bureau bears a portion of the responsibility for the situation, given that it did not decide XOCS's appeal until over six years after it was filed. This delay will impede XOCS's ability to access relevant data and provide clarifications consistent with these new standards. Therefore, imposition of new standards of evidence would be unfairly burdensome, and fairness demands the Commission find that these standards can only be applied going forward.

II. BACKGROUND

The services in question in this case were provided by XOCS ten years ago. By letter dated July 7, 2008, USAC's Internal Audit Division initiated an audit of the Form 499-A filed by XOCS in 2008, covering 2007 calendar year revenues. Over the next two years, USAC conducted an extensive audit of over $1.4 billion in revenues reported by XOCS. For a

significant period of time, XOCS made its personnel available for interviews with USAC's auditors and extensively explained the methodology that the company used to report its revenues on the Form. Over the course of the audit, in an unprecedented move, USAC did not audit the methodology used by XOCS to report its revenues, but instead attempted to construct its own version of the Form 499-A, essentially from the ground up. In so doing, USAC made a number of errors, many of which became the subject of XOCS's appeal to the Commission.

A portion of USAC's inquiry that is relevant here concerned XOCS's private line services. In 2007, XOCS provided Dedicated Transport Services, which are non-switched point-to-point services offered on a stand-alone basis or as part of a private network. The Dedicated Transport Services at issue primarily supported businesses, organizations, institutions, and service providers that need to exchange data, emails or files between two or more discrete locations.

XOCS provisioned its Dedicated Transport Services for non-carrier customers in virtually all cases as closed communications circuits, in combination with hardware (equipment and connection facilities, fiber optic and/or copper cables), signaling (DSx, OCx, Ethernet, etc.) and management services to support the non-switched network. XOCS did *not* connect the Dedicated Transport Services at issue (i) to circuits provided by other carriers, (ii) to customer premises equipment ("CPE") that bridges traffic to another location, (iii) to the PSTN, or (iv) to the Internet. Therefore, to the best of XOCS's knowledge and belief, virtually all traffic transmitted over virtually all such Dedicated Transport Services of its business customers both originated and terminated within the business customers' facilities. Because the traffic was non-switched, XOCS, however, lacked any ability to affirmatively measure the traffic. Moreover, XOCS had no ability to police a customer's use of the circuit, including any customer-provided

connections that it may have made to other services or service providers. Thus, XOCS treated the traffic as intrastate unless a customer provided a certification as to non-*de minimis* interstate usage, consistent with the standard interpretation of Commission rules.

On November 2, 2010, USAC notified XOCS that its Board had adopted the Audit Report that was the subject of XOCS's appeal to the Commission. USAC, purporting to apply the Commission's Ten Percent Rule, concluded, with minor exceptions, that all revenues from a variety of XOCS Dedicated Transport Services should be treated jurisdictionally as 100% interstate. XOCS filed its request for review of the USAC decision in December 2010.[3]

On March 30, 2017, the Wireline Competition Bureau issued an order that addressed XOCS's review request along with five other review requests that involve USAC's interpretation of the Ten Percent Rule and the appropriate jurisdictional treatment of private line communications.[4] The Bureau found that the Ten Percent Rule involves consideration of the nature of the traffic and makes no presumptions based on the existence or absence of customer certifications to more than 10 percent interstate traffic.[5]

III. ISSUES

XOCS now seeks review of the Bureau's decision in the *Private Line Order*, because it employs a different, but still flawed and incorrect, understanding of the Ten Percent

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3 XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 9, 2010). As noted, XOCS subsequently converted its corporate form to an LLC.

4 *See* Private Line Order.

5 *Id.* at 2141, ¶ 2. The Bureau also remanded the requests for review to USAC for further consideration of evidence consistent with new evidentiary standards adopted by the Bureau in the Order.

Rule. Furthermore, XOCS questions the fairness of the Bureau's decision to apply on remand new evidentiary standards to services provided ten years ago.

A. The Bureau's Interpretation of the Ten Percent Rule Is Inconsistent with Commission Precedent Showing a Presumption of Intrastate Jurisdiction Absent Evidence to the Contrary.

In the *Private Line Order*, the Bureau finds that the absence of a certification creates no presumption of intrastate treatment and has no role in the determination of the appropriate jurisdiction for traffic carried on private lines under the Ten Percent Rule.[6] This decision is incorrect and stands at odds with the objective of the rule as well as the rationale and language of the Commission orders establishing and interpreting the rule. Contrary to the Bureau's interpretation, the Commission's orders establish that private line traffic is appropriately presumed to be intrastate where the circuits are physically intrastate and there is no certification that more than ten percent of the traffic involves interstate communications. Because the Bureau's misconstrues the Commission's orders, the Commission should reverse the *Private Line Order*.

The Ten Percent Rule was created in the 1980s as part of the separations process. The Rule is used to allocate certain special access or private line costs to the intrastate or interstate jurisdiction when such facilities carry both intrastate and interstate traffic. When considering adoption of the Ten Percent Rule in 1989, the Commission noted that, previously, "the cost of special access lines carrying both intrastate and interstate traffic [had been] generally assigned to the interstate jurisdiction."[7] The Joint Board, assigned to study the matter, concluded

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6 *See* Private Line Order at 2145, ¶ 11.

7 *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 1352, ¶1 (1989) ("Recommended Decision").

that an approach that favored interstate designation "tended to deprive state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic."[8]

Consequently, the Joint Board recommended that the Commission adopt separations procedures for private lines and that such lines be allocated to the intrastate jurisdiction unless there is a showing "through customer certification that each special access line carries *more than a* de minimis *amount of interstate traffic*."[9] The Joint Board explained that the "typical situation involves physically intrastate systems carrying very small amounts of interstate traffic."[10] It sought a direct assignment methodology for such circuits in order to promote administrative simplicity and economic efficiency.[11] The Joint Board selected the customer certification method as a "uniform, nationwide verification system for separations purposes."[12] The Joint Board explained that the benefits of a certification-based verification method could be lost with other overly burdensome verification systems and, in particular, it "carefully circumscribed" situations in which carriers would look beyond the presence or absence of a certification.[13] Thus, it is clear from the Joint Board's recommendation that physically intrastate circuits would ordinarily be allocated to the intrastate jurisdiction, with

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8 *Id.*

9 *Id.* at 1357, ¶32 (emphasis added).

10 *Id.*

11 *See id.* at 1358, ¶ *35.*

12 *Id.* at 1357, ¶ 32.

13 *Id.* The Joint Board limited review beyond the certification to "system design and functions" whenever possible and stated that carriers should not seek usage information unless that information was "readily available without special studies." *Id.*

certifications being the uniform, administratively simply method for deviating from intrastate jurisdiction.

The Commission adopted the Joint Board's recommendation. In so doing, the Commission established a rule that physically intrastate private line circuits are under intrastate jurisdiction unless the carrier presents evidence, like through a certification, that more than a *de minimis* amount of traffic on the circuit is interstate. This rule thus, presumptively classifies private lines as intrastate, absent evidence to the contrary.

In the March 30th *Private Line Order*, the Bureau rejects this long-accepted interpretation of the historical intent behind the Ten Percent Rule as invalid by claiming that the Joint Board "explicitly rejected a proposal to directly assign mixed-use special access lines solely to the intrastate jurisdiction because 'it failed to recognize legitimate federal regulatory interests in this area.'"[14] This statement by the Bureau seems to misunderstand XOCS's argument and distort both the intent and reality of the Board's recommendation. XOCS makes no claim that *all* private line traffic always is considered intrastate. Rather, XOCS contends, consistent with the Joint Board's recommendation, that in the cases where there is at most *de minimis* interstate use, intrastate treatment is directly assigned.[15] Where more than a *de minimis* amount of interstate usage exists, the circuit is to be assigned to the interstate jurisdiction. The

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14 Private Line Order at 2145, ¶ 12.

15 *See* Recommended Decision at 1357, ¶ 30 ("We believe that direct intrastate assignment of mixed use special access lines carrying *de minimis* amounts of interstate traffic represents a major improvement over the current procedure. The interstate traffic on a special access line would be deemed *de minimis* for separation purposes when it amounts to ten percent or less of the total traffic on the line.").

demarcation between the jurisdictional assignment would be the presence (or absence) of a customer certification as to interstate usage.

The Bureau's reference to the Board's expressed concern about continuing a system that would potentially allow carriers to simply add *de minimis* amounts of interstate traffic to intrastate lines to avoid state regulation misinterprets the Board's point.[16] The Board was acknowledging a concern in properly classifying circuits, but followed up by recommending a way to fix it – i.e., by defining *de minimis* traffic as ten percent or less of the traffic.[17] Thus, the Joint Board did, in fact, propose a presumption of intrastate jurisdiction for certain private lines, and provided for interstate treatment where there is evidence of more than a *de minimis* amount of interstate traffic.

In making its recommendations, the Joint Board noted that the "typical situation involves physically intrastate systems carrying very small amounts of interstate traffic."[18] This is consistent with XOCS's decision to assign intrastate treatment for those cases where XOCS had configured its Dedicated Transport Services circuits to support communications only between a single customer's locations or the locations of a closed user group, and where XOCS did not have any evidence to the contrary. The Joint Board recognized that indications of the jurisdiction of a private line would be "system configuration" and "the nature of [a customer's] communications needs."[19]

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16 *See* Private Line Order at 2145, ¶ 12.

17 *See* Recommended Decision at 1357, ¶ 30.

18 *Id.*

19 Recommended Decision at 1357, n.137.

Nevertheless, in the *Private Line Order*, the Bureau misinterpreted these statements by the Commission and the Joint Board. The Bureau attacked a straw-man, asserting that there is "no basis for allowing carriers to simply presume, without any evidence or good-faith inquiry, that ten percent or less of the traffic on a mixed-use line is interstate."[20] But XOCS did not simply presume the traffic was intrastate, nor did it intentionally blind itself to the jurisdiction of the circuits. Instead – following the guidance from the Commission and the Joint Board – XOCS determined jurisdiction based on several factors, including the A and Z end points of the circuits and their configuration (and presented this basis to both USAC and the Commission). The Bureau's interpretation of the Ten Percent Rule negates these factors, and makes carriers prove the negative – that the circuit does not carry more than 10% interstate traffic – in all instances.

Further, the Bureau misinterprets the significance of customer certifications in assigning jurisdiction. The Bureau asserts that petitioners were conflating "the primary rule—that a mixed use private line is assigned to the interstate jurisdiction if more than ten percent of the traffic is interstate" with what it says is essentially a requirement for supporting documentation associated with the rule.[21] It is the Bureau, however, that errs in its understanding of the role of certifications. Commission precedent points to the certification as being a key determinant of interstate traffic, because the certification can be used to establish interstate

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20 Private Line Order ¶ 11 ("[C]arriers and their customers must make a good faith effort to assign a mixed-use private line to the appropriate jurisdiction because no default presumption of interstate or intrastate jurisdiction exists.").

21 *Id.*

jurisdiction without "burdensome verification requirements."[22] The Commission has consistently affirmed that certification is required to establish the *interstate* jurisdiction of a dedicated circuit that otherwise is intrastate in nature based on its end points.[23]

In 1995, the Commission summarized its rule regarding the jurisdiction of mixed-use private lines as follows: "a subscriber line is deemed to be interstate *if the customer certifies that ten percent or more of the calling on that line is interstate*."[24] Three years later, when faced with the question of whether GTE's DSL line service should be tariffed before the Commission or at the state level, the Commission applied the Ten Percent Rule to conclude that these services were interstate.[25] Critical to this conclusion was the Commission's finding that "GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate."[26] In other words, GTE - unlike XOCS here - configured the lines to carry more than a *de minimis* share of interstate traffic and intended to require corroborating certifications. Most recently, in 2001, the Commission reaffirmed the continued use of the Ten Percent Rule in the context of Part 36 based

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22 *See* Recommended Decision ¶ 32; *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660, ¶3 (1989).

23 *See e.g., Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.,* 10 FCC Rcd 4153 ("National Association for Information Services Petition"); *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22481, n. 95 (1998) ("GTE Decision"); *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 16 FCC Rcd 11167, ¶ 2 (2001).

24 National Association for Information Services Petition at 4161, ¶17 (1995) (emphasis added). In this case, the Commission articulated the 10% Rule as requiring a showing that "10% or more" of the traffic is interstate rather than "more than 10%" of the traffic is interstate. The distinction is not relevant in resolving XOCS' appeal, and XOCS summarizes the rule as requiring a showing that more than 10% of the traffic is interstate as do the 2008 Form 499-A Instructions.

25 GTE Decision at 22481 (1998).

26 *Id.* n.95.

on an affirmative certification of *more than 10% interstate use*. The Commission explained that, under the rule, "mixed-use lines would be treated as interstate *if the customer certifies that more than ten percent of the traffic on those lines consists of interstate calls*."[27]

As the foregoing makes clear, the Commission has repeatedly and consistently held that the interstate treatment of a private line with A and Z points in the same state requires certain conditions to be satisfied. First, the Ten Percent Rule only comes into play if a private line carries ***both*** intrastate and interstate traffic. Second, under the Ten Percent Rule, a line would be considered jurisdictionally interstate ***only if*** the customer has certified that more than ten percent of the traffic on that line is interstate in nature. Significantly, the Commission has never indicated that under the Ten Percent Rule there is a presumption that a private line is interstate in the absence of a certification, nor has it held that carriers must provide other circuit-specific affirmative evidence that 90% or more of the traffic is intrastate.

The Bureau's reading of the rule essentially requires service providers to demonstrate that their private lines do not contain interstate use. The Bureau's analysis is flawed and does not comport with the actual intention of the rule. The rule says that where the circuits in question are physically intrastate and there is no affirmative evidence that any of the traffic over such Dedicated Transport Services circuits is interstate, the revenues from such circuits must be treated as 100% intrastate.[28] Therefore, the Commission should reverse the Bureau's finding on this matter.

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27 *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 16 FCC Rcd 11167, ¶ 2 (2001) (emphasis added).

28 Moreover, the Bureau, like USAC, appears to presume that all private line circuits are mixed-use circuits. Neither USAC, nor the Bureau (nor XOCS, for that matter) has any basis on which to conclude that the circuits in question carry mixed-use traffic.

B. The Commission Improperly Seeks to Apply New Evidentiary Standards to XOCS Retroactively

In the *Private Line Order*, the Bureau determined that USAC did not give sufficient attention to some of the evidence provided by petitioners regarding how they reached their jurisdictional classification decision.[29] To provide clarity on how to weigh these matters and inform what evidence is considered determinative, the Bureau remanded all the requests for review and provided additional guidance regarding such evidence.[30] Through this guidance, however, the Bureau created new standards for what is considered valid evidence when trying to assess whether traffic is appropriately classified as intrastate or interstate. The Bureau does not have the authority to establish such new standards without notice and opportunity for comment. It is particularly inappropriate for the Bureau to instruct USAC to apply these new standards retroactively, to (in XOCS's case) services it provided ten years ago.

The Bureau's instructions go beyond ordinary clarifications, and instead appear to require new actions and new evidence that would be impractical to expect to be available retroactively. For example, in the *Private Line Order*, the Bureau notes that carriers may seek certifications from customers that would state whether or not more than ten percent of the traffic used was interstate in nature.[31] The *Private Line Order*'s certification regime – in which certifications would address whether the traffic is more than ten percent or less than ten percent interstate[32] – represents a fundamental change from the separations process's certification regime, in which certifications address only whether the traffic is more than ten percent

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29 Private Line Order ¶ 23.

30 *See id.*

31 *See id.* at 2148, ¶ 25.

32 *See id.*

interstate. The approach outlined by the guidance would defeat the main purpose for the Ten Percent Rule – to minimize the burden on filers – by requiring them to prove whether or not the interstate traffic levels are *de minimis*.

Moreover, the Bureau adds a new obligation on top of the basic certification requirement, namely that, purportedly in order to ensure customers understand this expectation and apply the proper standard, carriers must "make customers aware that it is the nature of the traffic over the private line that determines its jurisdictional assignment."[33] Specifically, the *Private Line Order* states "[t]o ensure that customers make informed certifications, carriers should provide basic guidance to their customers regarding what constitutes intrastate or interstate traffic."[34] These requirements did not exist prior to this decision and it would be impossible for XOCS to sufficiently demonstrate that its customers were aware of when certifications should be provided. It would be unreasonable, therefore, to apply such standards retroactively to XOCS's customer circuits.

Additionally, the Bureau explains that "revenues associated with services purchased pursuant to a tariff are properly assigned to the jurisdiction in which the tariff was published"[35] but that, a carrier should have "adequate safeguards" to prevent a customer from purchasing from a tariff that it is not eligible. In its guidance, the Bureau seems to instruct USAC to assess whether or not carriers have sufficient procedures in place to prevent incorrect

33 *Id.*

34 *Id.*

35 *Id.* at 2148, ¶ 24.

purchasing from a tariff then refer the case to the Commission as it deems necessary.[36] This is a completely new approach and in the *Private Line Order* the Bureau provides no real guidance or information on how USAC would judge the adequacy of a safeguard, particularly as it existed 10 years ago. Therefore, it would be unjust to apply this requirement to XOCS's activities from ten years in the past with the possible result of future penalties.

Finally, when discussing the use of system design factors in classification, the Bureau appears to require the carrier "to demonstrate that its private lines are not linked by the customer to other network facilities" that may permit interstate traffic.[37] This purported guidance goes beyond the Joint Board's recommended use of system design information. In the *Recommended Decision*, the Joint Board recommends review of "general information concerning system design and functions" (and, even then, only when there is reason to believe a certification as to interstate use is "questionable"). Nothing in the Joint Board's recommendation suggests that a carrier must know what *other facilities* a customer may connect its services to, much less to prove that such usage is not possible. XOCS does not anticipate that it would be able to provide such precise information as to customer activity that occurs on its side of the service demarcation point, and is highly unlikely to be able to provide circuit-by-circuit information for services it provided 10 years ago. For this reason alone, the Commission should make clear that it will not require such proof retroactively.

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36 *See id.* ("If USAC believes that a carrier is violating Commission rules by providing tariffed services to customers that are not eligible for the tariff, it may refer such cases to the Commission for further investigation.").

37 *Id.* at 2149, ¶ 27.

When the Commission has faced such situations before, it has determined that the best approach is to restrict the application of the new standards to future matters. For example in the *InterCall Order*, the Commission reversed a USAC decision that would have required a stand-alone conferencing provider to contribute to the universal service fund based on past revenues.[38] The Commission determined that it was generally unclear whether InterCall as a provider of audio bridging services had to directly contribute to USF, and therefore that it would be unfair to apply its conclusion retroactively.[39] Notably, in *InterCall*, the Commission acknowledged that it bore some of the responsibility for the uncertainty, as a result of "actions (or the lack thereof) in certain Commission proceedings [that] may have contributed to the industry's unclear understanding."[40]

The Commission has also given only prospective effect to new contribution-related certification procedures. When the Commission clarified the certification requirements for resellers in 2012, it specified that the revised certification procedures would not take effect until January 1, 2014, in order to allow time for carriers to "make changes to their internal policies and procedures, as well as to their existing contracts, to ensure compliance with the Commission's reseller requirements as clarified in this order."[41]

In this case, the Bureau's decision to provide new guidance to USAC on remand implicitly acknowledges that the Commission's prior guidance was incomplete or unclear.

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38 *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731 (2008) ("InterCall Order").

39 *Id.* ¶ 23.

40 *Id.*

41 *See In the Matter of Universal Service Administrative Company Request for Guidance,* WC Docket No. 06-122, Order, 27 FCC Rcd 13780, ¶ 41 (2012).

Moreover, the guidance outlined in the *Private Line Order* constitutes not just simple clarifications it establishes wholly new standards, often requiring additional actions (such as educating customers on how to complete certifications) for private line carriers to complete. While the Bureau's guidance may be useful to both USAC and service providers moving forward, it is unreasonable for the Bureau to call for them to be applied on remand in a retroactive fashion.

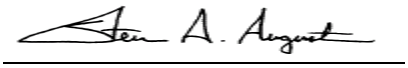
These standards did not exist at the time XOCS was being audited by USAC nor subsequently when the company appealed USAC's decision. Furthermore, the Commission has let over six years elapse since this XOCS filed its appeal in this case. To the extent that XOCS ever had the ability to provide the kind of information described, it most certainly has had that ability diminished in the intervening six years. XOCS cannot, as a practical matter, now go find new evidence relating to services that it provided ten years prior to customers some of which may no longer exist. Moreover, many employees that possibly could have been helpful to getting this new information are no longer with the company.

Therefore, fairness warrants that, if the Commission remands any portion of the case to USAC, it direct USAC not to apply these new standards retroactively and instead instruct USAC to evaluate the evidence XOCS did produce in light of what was reasonable to expect at the time. The *Private Line Order* should be reversed to the extent that its instructions are to the contrary.

IV. CONCLUSION

For the above reasons, XOCS respectfully requests that the Commission reverse the Bureau's decision regarding the proper interpretation of the Ten Percent Rule and applying new standards of evidence on remand.

Respectfully submitted,



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May 1, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2017 true and correct copies of the foregoing *XO Communications Services, LLC Request For Review of Decision of The Wireline Competition Bureau* were provided via first class U.S. Mail and/or electronic mail to the following:

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